No. 2436

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TIMOTHY HEALY, for and on behalf of RHAGAT SINGH et al. and SUNDAR or SANDU SINGH et al.,

Appellant,

vs.

SAMUEL W. BACKUS as Commissioner of Immigration at the Port of San Francisco, for the United States Government,

Appellee.

OPENING BRIEF FOR APPELLANT.

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PERNAU PUBLISHING COMPANY

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This appeal is from an order of the United States District Court for the Northern District of California, denying appellant's prayer for writs of habeas corpus, and from the decision of the said Court as to the law therein involved.

As this matter throughout the proceedings below has been referred to as "the case of twenty-two Hindoos" it will be so referred to herein.

On the authority of Wong Heung v. Elliott (C. C. A.) 179 Fed. 110, appellant states facts.

It is undisputed that these twenty-two Hindoos are, and each of them is, a subject of the King of England and, as such, entitled to the protection of the treaty between the United States and Great Britain, which treaty contains the most favored nation clause.

These twenty-two Hindoos came from the ports of Shanghai and Hongkong, China, and Nagasaki, Japan, to the Port of Manila, Philippine Islands, where they presented themselves as alien immigrants applying for admission into the United States under the provisions of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910. They were admitted. That they submitted to and were given that full inspection and examination required by the Immigration Act and the rules and regulations of the Department of Labor, and that the question of whether or not they were at the time of admission likely to become public charges was determined is attested by the fact that each of these twenty-two Hindoos was granted a certificate of lawful entry into the United States as required by the rules and regulations of the department. And is further attested by the fact that some of them were required to furnish bonds that they would not become public charges while in the United States. The others were landed without being required to furnish such bonds, according to Section 26 of the Immigration Act.

These twenty-two Hindoos resided for various periods in Manila and pursued their various voca-

tions as opportunity afforded. Subsequently they informed the Insular Collector of Customs of the Port of Manila, as required by the rules, of their intention to go to the mainland of the United States, and, in conformity with Rule 14 of the Immigration Rules then in force, the Insular Collector of Customs furnished to each of these twenty-two Hindoos a certificate entitling the holder, upon arrival at a continental port and proper identification, to land without further examination, and without the payment of the head tax required by law of every alien immigrant applying for admission into the United States, that head tax having been paid by each of these Hindoos upon his admission into the Port of Manila.

But upon the arrival of these twenty-two Hindoos at the Port of San Francisco they were taken into custody by appellee herein. Their certificates of lawful entry, guaranteeing them free landing on the continent without further examination, were utterly disregarded, though it was not charged, nor suggested, that these certificates had been obtained by fraud or misrepresentation at the time of landing. While thus in the custody of appellee herein, they were detained at the immigration station at Angel Island. Appellee herein, or his subordinates, made application for a warrant of arrest, addressed to the Secretary of Labor, charging that these twenty-two Hindoos and each of them were "likely to become public charges". They were given pretended hearings on these charges. They presented, in addi-

tion to the certificates above referred to, various amounts of money, ranging from $45 to $160 gold. As the record below shows, they had various amounts of valuable personal and real property in the land of their birth and the cities of their residences in China and Japan. They stated that they left China and Japan to improve themselves in the Philippines and left the Philippines to improve themselves in the mainland. There were also offered by these Hindoos affidavits by a number of responsible employers of large numbers of workers in California, in which affidavits these specific twenty-two Hindoos were offered employment at good wages in occupation that the employers swore offered work for more than five times the number of Hindoos involved herein.

Even were these Hindoos alien immigrants at the time of their arrival at the Port of San Francisco, instead of resident aliens domiciled with certificates of lawful entry under the Immigration Act, they should have been admitted on the showing thus made.

U. S. v. Martin, 193 Fed. 975;
In re Saraceno, 182 Fed. 955;
U. S. v. Williams, 189 Fed. 915.

The warrant for the arrest of these Hindoos issued on the mere application that it be issued, on the ground that these Hindoos were "likely to become public charges because they were Hindoo laborers and that there exists a strong prejudice against them

in this locality''. There was not attached to the application for the warrant of arrest any of these things required by Immigration Rule 22, nor of any subdivision of Rule 22, all the statements made in the application being mere conclusions of law and failing to state facts bringing these Hindoos within the excluded classes.

U. S. ex rel Haber v. Sibray, 178 Fed. 144.

Nevertheless the warrants of arrest issued, not on the ground alleged in the application for the warrant, but on an entirely different ground, not on the charge that they were likely to become public charges, but on the ground that they ''were unlawfully in the United States in that at the time of their entry they were of the excluded classes, in that they were then persons likely to become public charges. It is submitted that this variance is fatal.

U. S. v. Uhl, 211 Fed. 628 (C. C. A.);
U. S. v. Sibray, 178 Fed. 150;
U. S. v. Williams, 183 Fed. 904;
Ex parte Avakian, 188 Fed. 688;
Ex parte Koerner, 176 Fed. 478;
Spring v. Morton, 182 Fed. 330;
Redfern v. Halpert, 186 Fed. 150; 108 C. C. A. 262;
U. S. v. Tsaji Suekichi, 199 Fed. 750; 118 C. C. A. 188.

However, the pretended hearing proceeded to the taking of testimony and at no hearing was any testimony adverse to the Hindoos taken from any witness

under oath. And, as the record shows, no evidence was adduced upon which a finding adverse to the Hindoos on any charge could be predicated, up to or about August 20, 1913. At that time appellee herein informed appellant herein that the record was closed and ready for submission to the Secretary of Labor for final determination.

Thereafter, and from or about August 20, 1913, up to or about September 25, 1913, appellee herein was represented on a tour of the State of California by W. H. Chadney, Immigrant Inspector, and H. Schmoldt, stenographer, who visited a great many cities and towns, administered oaths to and took the affidavits of and received written opinions and statements from approximately thirty persons, workingmen, union labor officers, railroad station agents, constables and small storekeepers in rural communities, all without the knowledge or any notice to these twenty-two Hindoos or their attorneys, and not in the presence of either the Hindoos or their attorneys. These ex parte affidavits, opinions and statements contained expressions of general hatred and contempt for Hindoos as a race, but nowhere was anything said about these specific twenty-two Hindoos or any of them. And in addition to these ex parte affidavits, opinions and statements about Hindoos as a race, there were also attached to the record about 1000 columns of newspaper clippings which were introduced into the record by the Asiatic Exclusion League, an organization formed, among other purposes, to prevent the

landing within the United States of any persons of Asiatic extraction, including Hindoos. These newspaper clippings were accumulated during a period of four years and were originally printed in all parts of the United States. They were editorial expressions of hatred and contempt for the Hindoos as a class, reports of misconduct of Hindoos in various localities, and general propaganda by labor unions against Asiatics, but not one word about these twenty-two Hindoos or any of them. These ex parte affidavits, statements and newspaper clippings were attached to the record on which the Secretary of Labor issued his warrant of deportation, though they were necessarily made without that safeguard these Hindoos should enjoy, that of the personal responsibility of the affiants and authors as to their truth, or the test of cross-examination as to their accuracy, considering the temptations they may be under to deceive, and their probable means of accurate information in regard to the subject matter of their statements. The statements were not made under the solemn obligation of an oath or affirmation, and were made without the liability of a criminal prosecution for perjury in case of falsehood, nor were the twenty-two Hindoos against whom this sort of matter was admitted given an opportunity to cross-examine those persons to show if they had bias in regard to the matter in dispute.

U. S. v. Sibray, 178 Fed. 144;
Ex rel Bosmy v. Williams, 185 Fed. 598;
U. S. v. Williams, 189 Fed. 915;

U. S. v. Martin, 193 Fed. 795;
Ex parte Long Lock, 173 Fed. 208;
U. S. ex rel Huber v. Sibray, 178 Fed. 150;
U. S. ex rel. Falce v. Williams, 191 Fed. 1001;
Ex parte Pouliot, 196 Fed. 437.

The administration of the oath to those affiants and witnesses in the ex parte proceedings by the Immigration Inspector is without authority in law, as the Immigration Act only authorizes officers to administer oaths in proceedings touching the right of an alien to enter the United States and not in proceedings involving the right of an alien to remain after entry or for the purpose of banishing aliens from the United States for causes arising after they have been admitted.

Hanges et al. v. Whitfield, 209 Fed. 675 (and cases cited therein).

Nowhere was it alleged or suggested that the certificates of entry issued to these twenty-two Hindoos at the Port of Manila were obtained by fraud or misrepresentation, and they should have been admitted at the Port of San Francisco without further examination if identified, and it never was questioned that these were the rightful holders of those certificates.

Lim Hop Fong v. U. S., 209 U. S. 453.

At no time since the arrest of these twenty-two Hindoos up to the present moment was the question of the financial or physical condition of these twenty-two Hindoos at the time of their entry at

Manila inquired into, nor any evidence of any kind or character taken on that point by any one. Nevertheless the Secretary of Labor issued warrants for the deportation of these twenty-two Hindoos, requiring appellee herein to deport them to India.

The Honorable Judge Dooling correctly states in his written opinion on which the petitions for the discharge of the Hindoos were denied, that:

> "These cases involve the right of the individuals to land at the Port of San Francisco, having already been landed at Manila and coming thence here."

It will be observed that the Court below finds that the individuals have "already been landed at Manila", and nowhere is it even suggested that they were thus landed other than lawfully and in due form. As to their right to land at the Port of San Francisco after entry under the laws at another port, the constitutional guarantee of free intercourse among the states and peoples with all its privileges and immunities is invoked along with the most favored nation clause of the treaty between the United States and Great Britain.

Yick Wo v. Hopkins, 118 U. S. 356;
In re Tie Loy, 26 Fed. 611;
Hall's International Law, 4th Ed., p. 223;
Phillimore, International Law, Vol. 2, Chapter 2.

As pointed out in the opinion of the Court below, these twenty-two Hindoos "upon their arrival at

San Francisco, were arrested and, after a hearing, ordered deported as persons likely to become public charges''.

There is no provision in the immigration laws for the arrest and deportation of aliens already landed on the ground that they are likely to become public charges. That is a ground for exclusion at the time of the application of an alien for admission into the country.

Sec. 2, Immigration Act.

Between exclusion of an alien applying for admission and the expulsion of an alien after landing and being granted a certificate of lawful entry, there is a clear and broad distinction. As to public charges, persons in the position of these twenty-two Hindoos can be expelled from the country only in case they have become public charges, subsequent to entry.

Sec. 22, Immigration Act;
Rule 22, Immigration Rules.

If the public charge theory were worthy of consideration the circumstances of the cases of these twenty-two Hindoos clearly raise them out of the class, as nowhere has it even been suggested that these Hindoos, or any of them, ever was a public charge, anywhere in the world.

Rogers v. U. S., 152 Fed. 346; 81 C. C. A. 545;
U. S. v. Nakashima, 160 Fed. 842; 87 C. C. A. 646;

Looe Shee v. North, 170 Fed. 566; 95 C. C. A. 646;

Lim Jew v. U. S., 196 Fed. 736 (and cases cited).

As to the contention that these individuals were not accorded a fair hearing, it is sufficient to say that if what is contended for above and to follow in this brief is well founded, no hearing of any kind or character in San Francisco could be a fair hearing, for the reason that no person or tribunal has jurisdiction in a matter wherein a charge not within the scope of the laws is laid against these or other individuals.

In passing on the allegation of the petition that subsequent to the announcement that the taking of evidence in the cases had closed and the record made up for judgment by the Secretary of Labor, the Court below finds that ex parte affidavits were taken during a tour of the state by an Immigrant Inspector and that these were made a part of the record submitted to the Secretary of Labor. In passing on the admissibility of these ex parte affidavits, the Honorable Judge Dooling admits them and their contents, remarking that attorney for the Hindoos wrote the following letter to respondent, Samuel W. Backus:

> "This is in response to your letter advising that new evidence has been taken by the government in the case of a group of Hindoos, and that we will now be permitted to inspect the same, and offer further evidence.
>
> I thank you for the courtesy of the information."

Attorneys for the Hindoos thereafter vigorously protested against this procedure on the ground that the affidavits referred to were taken out of the presence of the Hindoos and their attorneys. There was no opportunity to cross-examine the affiants. This is a deprivation of the right of the Hindoos which is fatal to the whole proceeding, on the authorities cited heretofore.

Such deprivation cannot be consented to under any circumstances in which the affidavits were taken without notice or opportunity to be present, even though the above referred to letter by counsel could be construed as an acquiescence in the proceeding. Such construction, it is respectfully submitted, is beyond any reasonable reading of the letter. At most it is a mere acknowledgment of the receipt of information, appended to which is the polite expression of thanks for a piece of information, in no wise giving the recipient's views of the action announced, and certainly not accepting the procedure as legal or binding or acceptable to either the writer or those persons whose rights are in jeopardy.

We concur most heartily in the expression of the Court below that the question of whether or not there was any evidence to support the findings of the Department of Immigration in this proceeding, "and its determination either way will have a wide and far-reaching effect".

We think that one phase of the matter was most plainly stated by his Honor, Judge Dooling, when he said:

> "The question then presented, stripped of all its masks, is the following:
>
> May the Department of Commerce and Labor upon a showing satisfactory to itself (and a finding not open to review) that a prejudice exists in this country against aliens of any race, and that there is no demand for the labor of such race, exclude all laborers of such race on the ground that they are, for such reasons, likely to become public charges?"

And the Court below, with expressions of regret that he should feel compelled to so answer his own question, answers it in the affirmative.

If we were to concede the point well taken with respect to aliens seeking admission under the immigration laws, we are confident that it is not applicable to domiciled aliens who are subjects of a friendly power bound to us by the terms of a treaty. And, in this respect, attention is directed to the distinction that must be drawn between the exclusion of an alien applying for admission, and the expulsion of an alien received and welcomed under the strict and proper enforcement of the immigration laws. Leaving out of consideration the possibilities of such a construction of the laws with respect to aliens applying for admission, it is submitted that if it is to be so construed with regard to domiciled aliens extraordinary possibilities are opened up, to be realized or neglected only by the whim or fancy or the activity or inactivity of the persons charged with the enforcement of the law as thus construed.

The Hindoos here involved were admitted under the laws. They came under the jurisdiction and control of the United States as soon as they received their certificates of lawful entry, and as such were guaranteed the rights, privileges and immunities of all subjects of the King of England within the United States, by virtue of our treaty with Great Britain. If the immigration officers are empowered to select these men in a group upon their arrival at the gates of a state, subsequent to their admission at a different port under the laws of the nation, and declare that there is a prejudice against their kind of people and that, therefore, their kind of people are likely to become public charges, and, irrespective of the circumstances of each individual case, brand each of the group as of the class and thereupon expel them, the same course may be pursued with respect to any peoples of foreign birth, without regard to justice or equity. It is equally applicable to every other race, as the Court below declares in its written opinion. And further, the Honorable Judge Dooling points out the finding of the Secretary of Labor

> "is based upon conditions existing in this country, rather than upon any physical or mental defect in the individual petitioners. For a strong man unable to obtain an opportunity to labor is just as helpless as a weak one unable to perform such labor if the opportunity were afforded him."

This means that if twenty-two coal miners from Newcastle were to be admitted at the Port of New York under the proper administration of the im-

migration laws and were to go to the coal fields of Pennsylvania, they would remain undisturbed so long as they remained in the coal fields as miners, but, if they were to depart from New York and sail to the Port of New Orleans, they could be expelled from the United States on the same reasoning, that is to say: Being strong men removing themselves from the field of their regular occupation, they could be expelled on the theory that their inexperience in the industries of the south and a preference among southern employers for negro or child labor, would lessen their opportunities or prospects for obtaining profitable employment, and thus they could be expelled from the United States and by warrant of deportation returned to the Port of Liverpool, irrespective of their financial or physical condition, either at the time of entry at New York or arrival at New Orleans, and under the circumstances of the case at bar, the miners could be thus driven from the country in spite of offers by employers to engage at good wages those particular coal miners and other coal miners to a number exceeding five times the number ordered deported.

It is respectfully submitted that such is not the law. Here is discrimination against an arbitrarily created class of persons who are subjects of a friendly power.

And as the Court below pointed out:

> "But let there be no delusion that this power, once conceded, can be used only in the case of Hindoos. It is equally applicable to every other

race. Conceding the power to the Department of Labor to exclude the Hindoo laborer for this reason, we must concede to it the power to exclude, for the same reason, the laborer of any other race. It is a vast power, and one which, upon the argument of this case, I was very unwilling to believe was lodged in any executive department of the government.

"In the present cases, therefore, the Department, having the right to determine the fact as to whether these petitioners are persons likely to become public charges, has determined that they are. The fact that this determination is based upon conditions existing in this country, rather than upon any particular physical or mental defect in the individual petitioners, does not in my judgment make such determination any the less final, or render it any more open to review by the courts. For a strong man unable to obtain an opportunity to labor is just as helpless as a weak one unable to perform such labor if the opportunity were afforded him. For these reasons the order of deportation cannot be disturbed because of failure of proof. There is left then to be considered only the third contention of petitioners, that having been permitted to land at the Port of Manila, they are entitled to come to the mainland without further question.

"The statute provides that the Commissioner General of Immigration shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall establish such rules and regulations, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of the Immigration Act. At the time that some of these petitioners landed in the Philippines, Rule 14 of the Immigration Rules was as follows in so far as applicable here:

"'Sec. 1. Aliens arriving in the Philippines bound for the continent shall be inspected and given a certificate signed by the insular collector of customs at Manila showing the fact and date of landing.

"'Sec. 2. Aliens who, having been manifested bona fide to the Philippines and having resided there for a time, signify to the insular collector of customs at Manila an intention to go to the continent shall be furnished such certificate, as evidence of their regular entry at an insular port.

"'Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be admitted without further examination.'

"On June 16th, 1913, however, the foregoing rule was amended to read as follows:

"'Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the mainland.'

"Some of the petitioners here landed at Manila on June 20th, 1913, after the foregoing amendment was in force. But whether they landed at Manila before or after the amendment does not seem to me to be at all material, as the amendment was in force for some time before any of them left the Philippines for the mainland. It is urged that this amendment is beyond the power of the department to enact, and that an alien once landed in any territory, or other place subject to the jurisdiction of the United States, may freely go thence to any portion of the United States whether it be the mainland or any of its island possessions. With this conclusion I am unable to agree.

> "There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions, and standards of living are so diverse, that one going to the Philippines who would not there be likely to become a public charge, might well be likely to become such if he proceeded thence to the mainland. A more rigid test may, therefore, well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines. And as the amendment to the Immigration Rules providing that the possession of a certificate of lawful entry into the Philippines should not be conclusive as to the holder's right to enter a continental port was in effect at the time that all of these petitioners sailed from Manila, the question was properly open for investigation by the immigration officers here as to whether or no at the time these aliens were admitted to the Philippines, they were likely to become public charges if they proceeded thence to the mainland. This question was investigated upon their arrival here, and was decided adversely to the petitioners."

Nowhere does the Immigration Act, so far as appellant is able to discover, nor the constructions given it in the adjudicated cases, contemplate conditions existing in a community and totally foreign to the health, wealth, thrift, ability, character or enterprise of a domiciled alien as grounds contemplated for the expulsion of an admitted alien resident from the United States because he moves from one part of the jurisdiction of the nation to another part of that same jurisdiction.

It is conceded that the Commissioner General of Immigration has power to make rules and regulations, not inconsistent with law, but it is respectfully submitted that making rules, or amending rules designed to regulate the admission of aliens into the United States is entirely different from making rules or amendments restricting resident aliens bearing certificates of lawful entry, in the exercise of the constitutional right of free intercourse within the jurisdiction of the United States. The changing of the rule after the lawful admission of the aliens into the United States alters the procedure upon which they were entitled to rely during their residence under our laws. This amounts to an unwarranted alteration of the legal rules of evidence, requiring different evidence than the law required when the aliens were admitted.

Calder v. Bull, 2 Dall. 328.

And is a change in the law which, assuming to regulate privileges, in effect imposes the deprivation of a privilege which, when acted upon, was guaranteed by departmental regulation.

Departmental rules have the force and effect of law only when not inconsistent with the acts which they are intended to enforce, or with the constitution or existing treaties.

Ex parte Chow Chok, 161 Fed. 627.

It would seem to follow, therefore, that an alien who has entered and become a resident of any of the extra-continental possessions of the United

States would not be subject on a visit to the United States to the payment of the head tax here, irrespective of whether or not he had paid the head tax required by the jurisdiction in which he is connected, citizens of the Philippines have been held not to be subject to the payment of the tax provided by the Act of March 3, 1903.

Opinion Atty. General 131, 1904.

Until Congress legislates on the matter or laws in effect are possible of such construction as granting the power, the Secretary of Labor has no power to make rules restricting the intercourse of persons between different parts of the United States. It is an executive effort to regulate commerce between the several states and territories.

Beyond doubt these words (privileges and immunities) are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one state to pass into another state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and hold real estate, etc.

The right to labor in any honest, necessary, and in itself harmless calling, where it can be the most conveniently, advantageously, and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the

constitution to every American citizen, and to every person residing within its protection.

In re Tie Loy, 26 Fed. 611;
Yick Wo v. Hopkins, 118 U. S. 356.

The right of domiciled aliens to retain their domicile is, under the universally recognized rule of international law, the necessary consequence of having been allowed by this Government to acquire it. And it would seem that had Congress, in the just exercise of its sovereign power, seen fit to revoke that right by municipal legislation, it would have done so in an unmistakable manner.

The validity of departmental rules issued under the authority of the Secretary of Labor, and previously of the Secretary of the Treasury and the Secretary of Commerce and Labor, has been passed upon frequently by the courts. *They have the force and effect of law when not inconsistent with the provisions of the Acts themselves, or of the Constitution of the United States,* or the treaties of this country with foreign powers, and are binding in the courts.

Ex parte Chow Chok, 161 Fed. 627;
Fok Young Yo v. U. S., 185 U. S. 296; 46 Law Ed. 917.

In the ordinary run of cases a favorable decision of the Immigration Officer at the port granting the alien leave to enter the United States is the last step to be taken by the alien in connection with the establishment of his admissibility.

> "The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and *is to be regulated by treaties or by acts of congress,* and to be executed by the *executive authority according to the regulations so established* * * * so far."
>
> Yong Yue Tong v. U. S., 149 U. S. 698; 37 Law Ed. 905.

Any alien permitted to enter a foreign country may claim as of right the privilege conferred by the municipal laws thereof; in other words, the constitutional provisions and statutory enactments in force therein. This principle applies to its full extent only in cases where the alien has actually lawfully entered and settled in the country for the purpose of establishing his domicile therein, provided, furthermore, that he does not belong to or become a member of a class subject to the deportation proceedings either through his own act or by any act of its national legislature.

> Hall's International Law, 4th Ed., p. 223.

> "No country has a right to set, as it were, a snare for foreigners; therefore, conditions hostile to their interests or different from general usage must be specifically defined."
>
> Sir Robert Phillimore, International Law, Vol. 2, Chap. 2.

Vattal expresses the same idea in stating the principle that

> "The sovereign must not permit access to his territory for the purpose of luring foreigners into a trap."

Hence the principle that the right of expulsion, if exercised at all against aliens who come to a country having good reason to believe that, as to them, the ordinary procedure in any given case, sanctioned by civilized countries of the world, would be observed, *must not be arbitrarily exercised.*

> "Expulsion is legitimate only so far as it is demonstrated with evidence that the presence of those whom it affects imperils the peace within or without the security of the governors or the governed; that, in a word, it compromises one of the interests which the state guards. *It is necessary that the danger be certain,* that the menace be effective; the administration should not recur to this harsh measure except so far as the condition of the individuals who are the objects of it *inspires real and well-founded disquietude,* either in the inhabitants of the country or in the government itself, or, perhaps, even in a friendly government. *The universal conscience protests against the arbitrary use of the right of expulsion.*"
>
> Pradier Tode 're', Traite de droit international public par. 1857 and quoted by Mr. Sherman, Secretary of State, to Mr. Powell, minister to Hayti, No. 94, Jan. 8th, 1898, M. S. Institute of Hayti, III, 622, cited in Moore Internat. Law Dig., Vol. IV, page 91.

The conclusion to be drawn from the authorities is that, while a sovereign state has an absolute right to exclude or expel any or all foreigners from its jurisdiction either in time of peace or war, a nation which exercises either right in an *arbitrary or un-*

just manner may render itself thereby liable to a demand for satisfaction on the part of the state whose national has been thus expelled or excluded.

As was said by Chief Justice Fuller:

> "In fact the only *limitation upon municipal legislation* affecting aliens may be said to consist in that *it must not be arbitrary or purely capricious* in nature, or directed towards him or those in a similar situation merely because they happen to belong to a particular nation."
>
> Lau Ow Bew v. U. S., 144 U. S. 47; 36 Law. Ed. 340.

At the risk of criticism for submitting so voluminous a brief, appellant is nevertheless constrained to continue because of the vast importance of the questions involved.

Appellee herein made return to the order of the Court below to show cause why the writ of habeas corpus should not issue, and in that return we find the inspiration and the motive of the warrant for the deportation of these twenty-two Hindoos. And the return imports verity unless impeached.

> Crowley v. Christensen, 137 U. S. 86;
> Ex parte Cuddy, 131 U. S. 280.

That return contains the following statement concerning the ex parte affidavits above referred to as grounds for expulsion of these twenty-two Hindoos:

> "Respondent alleges further that affidavits of state and county officials throughout the State of California were made opposing the admission of Hindoos into the United States. The names and respective offices of some of such affiants are as follows:

Paul Sharrenberg, Secretary-Treasurer California State Federation of Labor.

John P. McLaughlin, Commissioner of Labor for the State of California.

F. E. Sullivan, General Manager Spreckels Sugar Co.

H. E. Davis, Under-Sheriff Monterey Co., Cal.

T. J. Vitaich, Business Agent, San Joaquin County Central Labor Council.

Frank B. Braire, Chief of Police, Stockton, Cal.

Wm. Johnson, Chief of Police, Sacramento, Cal.

Eugene S. Wachhorst, District Attorney, Sacramento, Cal.

George E. Gee, Secretary Yuba County Trades Council.

J. P. Onstott, Farmer, Yuba City, Cal.

Charles J. McCoy, Chief of Police, Marysville, Cal.

P. Brannan, Special Officer, Marysville, Cal.

Harry E. Hyde, Mayor, Marysville, Cal.

J. V. Parks, Justice of the Peace, Oroville, Cal.

Wm. Lewis Kurran, Marshal, Oroville, Cal.

James J. Wood, Theatre Manager, Chico, Cal.

C. E. Daly, Merchant, Chico, Cal.

H. Moir, Postmaster, Chico, Cal.

F. J. Nottelmann, Merchant, Chico, Cal.

J. N. Kelly, Merchant, Chico, Cal.

M. G. Polk, County Surveyor, Butte Co., Cal.

Lon Bond, Attorney, Chico, Cal.

J. L. Barnes, Justice of the Peace, Chico, Cal.

M. H. Goe, Marshal, Chico, Cal.

Wm. Robbie, Mayor, Chico, Cal.

E. C. Hamilton, Manager Sacramento Valley Sugar Co.

Geo. A. Dean, Secretary San Joaquin County Central Labor Council.

H. Hamer, Immigrant Inspector, Bellingham, Wash.

"The consensus of opinion as set forth by these affidavits which are appended to the petition as exhibits, is to the effect that the Hindoo is an undesirable citizen; that he is filthy, insanitary, immoral, gives the officials continuous trouble by becoming intoxicated and subject to arrest; that he is a disagreeable member of every community because of his uncleanliness and offensive odor; that he becomes a public nuisance in crowding the sidewalks, street corners, postoffices and other public buildings; that merchants, theatrical managers and business men generally exclude him from their places of business; that the Hindoo is unreliable; that he is a petty thief, nomadic in his habits, will not remain employed in any particular work unless under a strict contract; that his standard of living is of the very lowest, and that he does not rear families or permanently establish himself in the country in which he works; that he is a degenerate physically, and generally in a weak and enervated condition, and invariably afflicted with the disease of hookworm; that the Hindoo belongs to the laboring class; that demand for Hindoo labor is very limited, and if desired at all is only for transient periods, and because of the strong prejudice against him, and the fact that he is continually a public nuisance and a burden to all society, it is deemed by all the affiants above named that he is likely to become a public charge, and that he should be expelled from the country.

"Respondent denies * * * that the affidavits are merely an expression of passion and prejudice culled from persons in various parts of the State of California, but that the affidavits were bona fide expressions of opinion of white merchants and officials in possession of experience and influence, and having come in direct contact with Hindoo laborers."

There was no impeachment of this return, but amendments were made for the reason that the matters set forth in the return were described by the Court below as showing the creation of a class by the Immigration Department and the placing within the class thus created these individual twenty-two Hindoos. It was pointed out to respondent that should the allegations of the return be true with respect to Hindoos resident within California prior to the coming of these twenty-two Hindoos, the laws provided the means of dealing with those guilty of the offenses alleged, and that allegations against other Hindoos could not be used against the persons whose right to remain in the United States was involved in this proceeding.

It is respectfully submitted that the Immigration Act names all the classes of persons who may be excluded or expelled from the United States upon application for entry and upon proof of offenses against the laws. Nowhere is provision made for the executive exercising legislative power to declare that any set or class of persons is undesirable and by mere arbitrary action placing particular persons in that class that the executive declares undesirable and, thereby laying foundation for the expulsion of those particular persons, to be acted upon as ground for deportation.

That is what is being attempted here. It amounts, in effect, to arbitrarily creating a class and then discriminating against that class on the mere ground of prejudice entertained by union labor leaders and

the members of that organization known as *The Asiatic Exclusion League.*

Respondent relied in the Court below on the case of ex parte Moola Singh and 72 other Hindoos, 207 Fed. 780. But the attention of this Court is called to the fact that in that case all the aliens were without the certificate of lawful entry and the certificate entitling them to admission at a mainland port without further examination, which fact clearly distinguishes that case from this one.

Dated, San Francisco,
October 7, 1914.

Respectfully submitted,

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TIMOTHY HEALY,
Attorneys for Appellant.